No. 89-193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DISTRICT NO. 1—PACIFIC COAST DISTRICT, MARINE ENGINEERS' BENEFICIAL ASSOCIATION, and NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, (AFL-CIO),

Petitioners,

v.

ROBERT N. FINNIE,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of California, First Appellate District

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PETITIONERS' REPLY MEMORANDUM

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TABLE OF AUTHORITIES

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PETITIONERS' REPLY MEMORANDUM

I.

Respondent Finnie concedes that the reasoning of the court below was "erroneous" and expressly disavows reliance on its theory on state court jurisdiction. Br. Opp. 3-4.[1] Under these circumstances, the most appropriate course is to grant the petition for certiorari and to vacate the judgment below for further consideration in light of Respondent's confession of error. This course would pre-

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[1] Throughout this Reply, "Pet." will refer to the Petition For Writ of Certiorari, and "Br. Opp." will refer to the Brief in Opposition to the Petition.

vent the anomalous result of allowing a judgment to stand which rests on a ground which both parties agree is unsound but would avoid a disposition which would have precedential weight if some state court were to assert jurisdiction on this theory in the future.

Yet Respondent urges that "if this Court is convinced for the reasons stated herein that the *result* below was correct, then it should deny certiorari, since however erroneous the reasoning below it was unpublished and therefore has no precedential value." Br. Opp. at 5, emphasis in original. Respondent thereby invites this Court to consider the factual and legal issues which he argues at great length and to do so without the benefit of an opinion by the Court of Appeals on these matters. This Court ordinarily prefers to decide issues only with the benefit of a lower court's analysis, even when these have been briefed on plenary consideration after review has been granted. *Cf. United States* v. *Sperry Corp.*, No. 88-952, decided November 28, 1989, slip op. at 13-14. For the Court to undertake such a task at the certiorari stage where only a very limited amount of time is available for each case is simply not feasible. On the other hand, Respondent would not be prejudiced by the course which we propose, since he would have a full opportunity to present his arguments to the Court of Appeal.

II.

For these reasons, we believe it inappropriate to address in detail the factual misstatements and legal arguments in Finnie's Opposition.[2] We are constrained to note

[2] In his Opposition, Finnie makes no response to the Unions' showing (at Pet. 6-14) that the *Garmon/Jones* preemption rule applies to this case. If Finnie had not confessed error, this lack of response would present a sufficient basis for summary reversal. Because Finnie did confess error with respect to the lower court's decision, however, the proper and most efficient course is for this Court to vacate the California Court of Appeal's ruling and remand to that court for further consideration.

briefly, however, that the facts he asserts and the arguments he advances are incorrect. In particular, Finnie repeatedly asserts that he ceased working for Calrice for "personal reasons" having "nothing to do with" the Unions' "threat of discipline," or "for reasons wholly unrelated to * * * the underlying labor dispute," that there was "no coercion or pressure, either direct or indirect, placed upon [Calrice] to fire Finnie," such that the Unions' conduct could not even arguably violate Section 8(b)(1)(B). Br. Opp. at 9.[3] Finnie's own admissions below show that just the reverse is true. In his "Declaration" filed in 1981 in support of his Petition (p. 1a *infra*), Finnie stated "under penalty of perjury" that (1) he left the vessel as a direct result of MEBA pressure associated with the underlying labor dispute; (2) the Unions placed "severe pressure" on Calrice while Finnie was employed by Calrice; (3) but for the Unions' pressure he would have continued working for Calrice; (4) Calrice replaced Finnie and the rest of the MM&P crew as a result of the MEBA; and (5) he was forced to take lower paying jobs and thus lost money as a result of the Unions' pressure:

> • In the summer of 1979 the jurisdictional dispute between MEBA and the MMP was resolved by the [NLRB]. The NLRB ruled in favor of MEBA, and the 'VALERIE F' now sails with a MEBA contract. *If I had not been expelled, I could have*

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[3] Finnie also totally misconstrues the Unions' position with respect to their "arguable" violation of Section 8(b)(1)(B). Contrary to Finnie's claim, the Unions have not argued "that [they] committed an illegal and prohibited act in disciplining Finnie." Br. Opp. at 1, fn. 1. Rather, the Unions' position is that the NLRB is the exclusive forum chosen by Congress to adjudicate conduct which arguably violates Section 8(b)(1)(B), and that this claim can be heard only by the NLRB. Before the Board, the Unions would argue that their conduct, while "arguably" prohibited for purposes of preemption analysis, did not run afoul of Section 8(b)(1)(B).

continued with the 'VALERIE F' as a MEBA chief engineer at the above-noted salary of $62,000 to $71,000 per year." (p. 2a *infra*) (emphasis added).

- I left the 'VALERIE F' immediately upon its arrival in San Francisco on May 12, 1979. *I did so because of the severe pressure by MEBA upon me and her owners* and as a result of my fear of violence if I continued with her. * * * (p. 2a *infra*) (emphasis added).
- I have suffered a severe diminution in my earning capacity as a result of my expulsion from MEBA. In the two non-MEBA jobs I have held since leaving the 'VALERIE F' *I have earned far less that I could have earned had I remained a MEBA member in good standing and stayed aboard the 'VALERIE F'."* (pp. 2a-3a *infra*) (emphasis added).

Indeed, Finnie himself concedes that: *"If in fact the Union had 'successfully pressured Calrice to replace him,' there is no question but that this would be a preempted Section 8(b)(1)(B) unfair labor practice."* (emphasis added). Br. Opp. at 19, fn. 14. In view of Finnie's own admission that the Union did just that, the trial court was correct when it determined that Finnie's lawsuit challenging MEBA's conduct was preempted.

Finnie's legal arguments are likewise unfounded. Finnie endeavors to distinguish *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411, placing great emphasis on the fact that Finnie "resigned from Calrice for unrelated reasons," and therefore the "potential for future divided loyalty, i.e. coercion in the employer's ability to freely select loyal supervisors, was not present in Finnie's case." Br. Opp. at 25. But, as we have shown, Finnie admits that he left the vessel solely because of the Unions' pressure on him and Calrice, and that the Unions' coercion affected his future "willingness to serve" as a

supervisor for Calrice.[4] *See Writers Guild*, 437 U.S. at 436. Thus, under *Writers Guild*, Finnie's action is preempted.

Finnie's reliance on *NLRB* v. *Electrical Workers*, 481 U.S. 573, is similarly unavailing. Finnie reads *Electrical Workers* as requiring a finding of actual "tangible" coercion by the union to make out a Section 8(b)(1)(B) violation. While we do not agree with Finnie's reading of *Electrical Workers*, it is sufficient to note that even under Finnie's reasoning his action would be preempted, because Finnie's own Declaration expressly states that he was forced off his job because of union pressure on him and his employer, and that such union coercion prevented him from continuing as a supervisory grievance-adjuster with that employer.[5]

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[4] Despite his allegations to the contrary (Br. Opp. at 29, fn. 27), Finnie's factual and legal admissions—that the Unions interfered with his contractual relationship with this employer and that such conduct affected his employer's Section 8(b)(1)(B) right to select grievance-adjusters—place his case on all fours with *Operating Engineers* v. *Jones*, 460 U.S. 669 at 679, 683.

[5] The grounds stated in the text are sufficient to dispose of Respondent's reliance on *Electrical Workers*. We note, however, that Finnie merely assumes, but does not demonstrate, that this 1987 decision can sustain state court jurisdiction over his Petition. While the issue has never been expressly addressed by this Court, the *Garmon* rationale seems to require the opposite conclusion. "In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction." *San Diego Unions* v. *Garmon*, 359 U.S. at 246 (1959). Even if, contrary to our submission, *Electrical Workers* constitutes such "clear precedent" *now*, in 1979 when Respondent's claim arose and in 1981 when he invoked state court jurisdiction (we think the former is more pertinent), it was clearly arguable that the Unions had violated § 8(b)(1)(B). Indeed, as late as 1985, the NLRB General Counsel issued a § 8(b)(1)(B) complaint in almost identical circumstances. See Pet. 10 and n.7. Thus, Finnie was required to follow the NLRA administrative scheme available to him. *Operating Engineers* v. *Jones*, 460 U.S. at 680-81.

CONCLUSION

For the foregoing reasons, and those set forth in our Petition, this Court should grant the Petition for Writ of Certiorari, vacate the decision below, and remand the matter to the California Court of Appeal for reconsideration. In the alternative, this Court should summarily reverse the decision below.

Respectfully submitted,

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Dated: November 30, 1989

APPENDIX

IN THE SUPERIOR COURT
FOR THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY
OF SAN FRANCISCO

No. 780847

[Filed May 29, 1981]

ROBERT N. FINNIE,
Petitioner,

vs.

DISTRICT NO. 1—PACIFIC COAST DISTRICT,
MARINE ENGINEERS BENEFICIAL ASSOCIATION; and
NATIONAL MARINE ENGINEERS BENEFICIAL ASSOCIATION
(AFL-CIO),
Respondents.

Declaration of Robert N. Finnie
In Support of Petition for
Writ of Mandate and Award of Damages

* * * *

I, Robert N. Finnie, declare:

I am 60 years of age. I am a licensed marine engineer and am qualified as a chief marine engineer. I am the petitioner in the above-entitled action.

* * * *

During the 53 days I was aboard the "VALERIE F" I earned over $18,000. Had I been able to keep the job,

I would have been able to earn between $62,000 to $71,000 per year, even only working six to seven months per year (as is the custom with marine engineers).

I left the "VALERIE F" immediately upon its arrival in San Francisco on May 12, 1979. I did so because of the severe pressure by MEBA upon me and her owners and as a result of my fear of violence if I continued with her.

In the summer of 1979 the jurisdictional dispute between MEBA and thhe MMP was resolved by the National Labor Relations Board. The N.L.R.B. ruled in favor of MEBA, and the "VALERIE F" now sails with a MEBA contract. If I had not been expelled, I could have continued with the "VALERIE F" as a MEBA chief engineer at the above-noted salary of $62,000 to $71,000 per year.

When I left the "VALERIE F" on May 12, 1979, it seemed even then that there was no likelihood I could obtain MEBA employment, in view of the clearly hostile attitude toward me exhibited by the mob picketing the ship's arrival.

And after my expulsion at the New Orleans trial on July 9, 1979, it was absolutely clear that I could not obtain MEBA employment.

Being deprived of the benefits of membership in MEBA means that the overwhelming majority—in the neighborhood of 90%—of the available marine engineer positions in the country are foreclosed to me, because the overwhelming majority of marine engineer contracts are held by MEBA.

I have suffered a severe diminution in my earning capacity as a result of my expulsion from MEBA. In the two non-MEBA jobs I have held since leaving the

"VALERIE F" I have earned far less than I could have earned had I remained a MEBA member in good standing and stayed aboard the "VALERIE F".

My first job after leaving the "VALERIE F" was with American Pacific Container Line, from May 15, 1979 to March 31, 1980. This was a non-MEBA job. I worked for them first as a shore-based engineering consultant and then as a shore-based salaried engineer. I was paid at the rate of approximately $26,500 per year in both capacities. Thus my salary with them was approximately $44,500 per year less than what I could have earned aboard the "VALERIE F" had I not been wrongfully expelled from MEBA.

My second job after leaving the "VALERIE F" was, and still is, with the U.S. Army Corps of Engineers as chief engineer on a dredge, from April 1, 1980, to the present.

* * * *

I declare under penalty of perjury that the foregoing is true and correct, except as to those matters stated therein on information and belief, and as to those matters I believe them to be true.

Executed at San Francisco, California on May 21, 1981.

/s/ _____

ROBERT N. FINNIE